CGU INSURANCE BHD

v.

ASEAN SECURITY PAPER MILLS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
[CIVIL APPEAL NO: A-02-338-2000]
8 DECEMBER 2000
[2001] CLJ JT(2)

CIVIL PROCEDURE: *Appeal - Leave to appeal - Respondent company wound up - Whether leave of winding-up court required - Companies Act 1965, s. 226(3) - Courts of Judicature Act 1964, s. 67*

COMPANY LAW: *Winding-up - Proceedings against company - Whether leave of winding-up court required - Companies Act 1965, s. 226(3) - Courts of Judicature Act 1964, s. 67*

This was the respondent's application to strike out the notice of appeal filed by the appellant in respect of a judgment of the High Court given in favour of the respondent. It was contended that since the respondent had already been wound up, the appellant should have obtained leave of the winding-up court before it filed the notice of appeal. It was argued that the failure to do so contravened s. 226(3) of the Companies Act 1965 ('CA') read together with s. 67 of the Courts of Judicature Act 1964 ('CJA').

Held:
Per Mokhtar Sidin JCA

[1] Section 226(3) CA imposes certain restrictions on any party commencing or proceeding to take up any action or proceeding against a company which has been wound up. Further, the CJA defines an appeal as a "proceeding" within the meaning of s. 67 of the CJA. Therefore, the appellant's appeal was subject to s. 226(3) CA whereby leave of the winding-up court was required before it could proceed with an appeal against the respondent company.

[Respondent's notice of motion allowed; appellant's notice of appeal struck out with consequential orders.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini merupakan permohonan responden untuk membatalkan notis rayuan yang difailkan oleh perayu berhubung penghakiman Mahkamah Tinggi yang diberikan kepada responden. Ianya telah ditegaskan bahawa oleh kerana responden telah pun digulung, perayu seharusnya memperolehi kebenaran mahkamah yang menggulung sebelum ianya memfailkan notis rayuan. Adalah dihujahkan bahawa kegagalan untuk melakukan sedemikian melanggari s. 226(3) Akta Syarikat 1965 ("CA") yang dibaca bersama dengan s. 67 Akta Mahkamah Kehakiman 1964 ("CJA").

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Seksyen 226(3) CA mengenakan sekatan tertentu ke atas mana-mana pihak yang memulakan atau meneruskan apa-apa tindakan atau prosiding terhadap sesebuah syarikat yang telah digulung. Selanjutnya, CJA mendefinisikan sesuatu rayuan sebagai suatu "prosiding" di dalam lingkungan maksud s. 67 CJA tersebut. Oleh itu rayuan adalah tertakluk kepada s.226(3) CA di mana kebenaran mahkamah penggulungan diperlukan sebelum ianya boleh meneruskan sesuatu rayuan terhadap syarikat responden.

[Notis usul responden dibenarkan; notis rayuan pemohon dibatalkan dengan perintah-perintah sampingan.]

Case(s) referred to:
Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(refd)***
Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 ***(refd)***
Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower & Anor [1983] 2 CLJ 7 ***(refd)***
Rawat Raj Kumar Singh & Ors v. Benares Bank Ltd, Benares (in liquidation) & Ors [1941] AIR All 154 ***(refd)***
Re Perdana Merchant Bankers Bhd [1997] 3 CLJ Supp 140 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 226(3)
Courts of Judicature Act 1964, ss. 3, 67(1)

For the appellant - Porres P Royan (T Sudharsanan with him); M/s Shook Lin & Bok
For the respondent - Karpal Singh (CK Leong & M Mathialagan with him); M/s CK Leong & Co

[Appeal from High Court, Ipoh; Civil Suit No: 22-211-90]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

This is an application by the respondent by way of notice of motion dated 13 September 2000 to strike out the notice of appeal dated 19 May 2000 filed by the appellant. The notice of appeal was in respect of a decision by the learned judge of the High Court, Ipoh in Civil Suit No. 22-211-1990 (hereinafter referred to as the "Ipoh civil suit"). It is to be noted that the record of appeal had been filed in this court and was also fixed for hearing. The ground to strike out the notice of appeal was that the appellant failed to abide to the mandatory provisions of s. 226(3) of the Companies Act read together with s. 67 of the Courts of Judicature Act 1964.

We have allowed this application earlier and we now give our reasons for doing so.

Before proceeding, we think it is necessary to give a brief summary of the appeal leading to this application. The respondent who was the plaintiff in the court below filed a writ of summons and statement of claim against the appellant claiming the amount insured for the respondent's building and the goods contained therein which were burnt down. The building and the goods were insured with the appellant and another insurance company. The appellant was sued for its share of the sum insured. This was Civil Suit No. 22-211-90 in the High Court, Ipoh. The respondent took out another suit against the other insurance company claiming the other half of the insured sum. This action was filed in the High Court, Kuala Lumpur. It is also to be noted that the appeal in respect of the decision by the High Court, Kuala Lumpur was also fixed for hearing before us. In respect of the Ipoh civil suit the respondent commenced the action on 9 November 1990. On 5 November 1992 the respondent was wound-up.

The appellant on knowing that the respondent was wound-up then made an application *vide* encl. 39 in the Ipoh High Court for security for costs. This application was heard by the deputy registrar. The respondent resisted the application but the deputy registrar made the order that the respondent to deposit the sum of RM70,000 as security for costs. Being dissatisfied with that decision both the appellant and the respondent appealed and cross appealed to the judge. It was at this stage that for the first time counsel for the respondent raised the issue of the mandatory provisions of s. 226(3) of the Companies Act 1965 whereby leave of the winding-up court is necessary before any action could be commenced against the respondent since it had been wound-up. Respondent's counsel submitted that s. 226(3) of the Companies Act is an absolute bar to the commencement of any

proceeding against a company in the liquidation unless leave of the court had been obtained. That being the case the proceeding before the deputy registrar was a nullity. The learned judge of the Ipoh High Court decided that leave was required before any proceeding could be instituted against the respondent. In the present appeal no leave was given to the appellant to proceed with encl. 39, the whole proceeding before the deputy registrar was a nullity and the order made by the deputy registrar in respect of security for costs should be set aside.

As a result of that decision the learned judge of the Ipoh High Court proceeded to hear the Ipoh civil suit filed by the respondent (Guaman Sivil No. 22-211-90). At the end of the trial the learned judge on 12 May 2000 gave his decision which favoured the respondent. The respondent was given judgment for the sum it had claimed. Against that decision the appellant appealed to this court. The notice of appeal was filed on 19 May 2000 and it is common ground that the appellant did not obtain any leave from the court to proceed with the appeal as required by s. 226(3) of the Companies Act. As a result of that the respondent made the present application. It is obvious to us and to both parties that if the respondent succeeded in this application then appeal No. A-02-338-2000 would lapse because it would be deemed that the appeal is not before us. The grounds for moving the motion are found in the affidavit of Sim Eng Pow dated 13 September 2000.

It was stated in that affidavit that the respondent was incorporated in Malaysia on 25 July 1985. On 1 June 1992, Pernas Trading Sdn. Bhd. petitioned the High Court at Kuala Lumpur to wind-up the respondent company. Pernas Trading Sdn. Bhd. had earlier obtained a judgment against the respondent and as on 20 April 1992 the amount due and owing by the respondent to Pernas Trading Sdn. Bhd. was RM1,909,440.98. By an order dated 5 October 1992 the respondent were wound-up and the official receiver was appointed as the provisional liquidator. By an order of the court dated 7 September 1993 the official receiver, Malaysia, was removed and Mr. Lim Tian Huat of Messrs. Arthur Anderson & Co. was appointed the new liquidator.

The grounds for this application are found in paras 18-26 of the affidavit of Mr. Sim Eng Pow dated 13 September 2000:

> 18. As stated above a winding-up order was made on 5.10.1992 by the High Court of Malaya at Kuala Lumpur winding up the Respondent Company. I am advised by my solicitors and verily believe that on that order being made, the relevant provisions of the Companies Act, 1965 became applicable to the Company. Of the various statutory

consequences, the one that renders the Appellant's appeal herein liable to be struck off is the requirement of leave contained in Section 226(3) of the Act which says that when a winding-up order has been made or provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the Company except by the leave of the Court.

19. I am advised by my solicitors and verily believe that the appeal herein filed by the appellant is without leave of the winding-up Court as required under Section 226(3) of the Companies Act, 1965.

20. I am advised by my solicitors and verily believe that the Appellant's appeal herein is a proceeding within the meaning of the word occurring in Section 226(3) of the Companies Act. Taking leave of the winding-up Court to lodge an Appeal against the Respondent Company is a statutory requirement, which has to be strictly complied with by the Appellant. The Appellant has to first apply to the winding-up Court of leave to present this appeal herein and only on leave having been obtained the appeal could then be presented. Leave of the winding-up Court is *sine-quo-non* for presenting the appeal against the Respondent Company. The mandate of Section 226(3) of the Companies Act has been ignored, and brushed aside by the appellant. As the threshold requirement of leave has been breached, the appeal herein against the Respondent Company is a nullity and should be struck off.

21. I am advised by my solicitors and verily believe that an appeal lodged in utter disregard of the mandate of Section 226(3) of the Companies Act is to be thrown out at threshold receives support from Section 67(1) of the Courts of Judicature Act, 1964 which says that the jurisdiction of the Court of Appeal is subject nevertheless to any other written law regulating the terms and conditions upon which such appeals shall be brought. The words any other written law in Section 67(1) of the Courts of Judicature Act includes Section 226(3) of the Companies Act. The jurisdiction of the Appellate Court is regulated by the requirement of Section 226(3) of the Companies Act and that this is evident by the words "subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeal shall be brought". As the appeal herein has not been brought by taking leave of the Court, this Honourable Court may be pleased to make an order striking off the appeal.

22. I am advised by my solicitors and verily believe that the object of the requirement of leave under Section 226(3) of the Companies Act is that the Act vests the overall control of winding-up in the winding-up court and the liquidator functions under the supervision of the winding-up Court. This is to ensure, *inter alia* that the just creditors of the Company are paid in accordance with priorities stated by the

Companies Act. The intention of the statute would be defeated and frustrated if leave under Section 226(3) of the Companies Act is not insisted upon as a condition precedent for lodging the appeal herein.

23. I am advised by my solicitors and verily believe that the provisions of Section 226 of the Companies Act are in *pari materia* with Section 446 of the Companies Act 1956 (India). Sub-section (4) of Section 446 reads "(4) nothing in sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or High Court". The Indian Act clarifies that to commence a proceeding or an action in a superior court, leave of the winding-up court is indeed necessary. It is the winding-up Court and that Court alone that can grant leave to commence an action or proceeding and a party cannot he heard to say that as he is invoking the jurisdiction of a superior court leave of winding-up Court, which in certain cases may be a subordinate Court, is not required. The hierarchy of Courts is not a relevant consideration. In so far as winding-up proceedings are concerned, it is the Court that made the winding-up order which can grant leave and no other.

24. I am advised by my solicitors and verily believe that the resultant position, is that without leave of the winding-up Court, the appeal herein against the Respondent Company is a nullity.

25. I am advised by my solicitors and verily believe that the commencement of a proceeding, which included filing of an appeal, against a Company represented by a Liquidator who is an officer of the Court is contempt of Court.

26. I am advised by my solicitors and verily believe that any judgment given in a proceeding which is not permitted by winding-up Court granting leave under Section 226(3) of the Companies Act is void. Hence the appeal filed herein by the Appellant is plainly opposed to Section 226(3) of the Companies Act and does not deserve consideration or merits.

During the submission of the learned counsel for the respondent those grounds were stressed again.

After hearing the arguments of both parties we were in complete agreement with the learned counsel for the respondent. Section 226(3) of the Companies Act 1965 provides:

> 226(3) When a winding up order has been made or provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except –
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

It is not disputed that the appellant did not seek or get leave under s. 226(3) of the Companies Act 1965 to file the notice of appeal and also to proceed with the appeal. The appellant took the view that there was no necessity to do so because it was an appeal against the decision of the learned judge of the High Court. As such it was a continuation of an earlier proceeding where the appellant was defending itself.

Section 67(1) of the Courts of Judicature Act 1964 provides:

> 67 Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercises of its original or of its appellant jurisdiction, **subject nevertheless to this any other written law regulating the terms and conditions upon which such appeals shall be brought**. (emphasis made).

We agree with counsel for the respondent that all civil appeals could be proceeded upon subject to any restrictions imposed by the Courts of Judicature Act or any other written law. In the present application it is clear to us that certain restrictions have been imposed by the law on any party commencing or proceeding to take up any action against a company which has been wound-up. One of them is s. 226(3) of the Companies Act. The words used in s. 226(3) are "action" and "proceeding". Section 3 of the Courts of Judicature Act 1964 defines those words as follows:

> 'action' means a civil proceeding commenced by writ or in such other manner as prescribed by rules of court but does not include a criminal proceeding;
>
> 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

It is clear to us that the Courts of Judicature Act defines an appeal as a "proceeding" within the meaning of s. 67 of the Act. That being the case any appeal to be proceeded upon is subject to the restrictions imposed. One of them is the restriction imposed by s. 226(3) whereby a party must obtain leave from the winding-up court to proceed with an appeal against a company which has been wound-up which include the commencement of the appeal that is the filing of the notice of appeal. This is a pre-requisite known as the threshold. In *Re Perdana Merchant Bankers Bhd.* [1997] 3 CLJ Supp 140, Abdul Malik Ishak J at p. 161 said:

> *Re Waterloo Life Insurance Co (No. 2)* [1852] 31 Beav 586 at p. 589 established a vintage principle to the effect that after a winding-up order had been made, further proceedings were absolutely stopped until leave has

been obtained from the court. The object of s. 446(1) of the Indian Companies Act 1956, which is equivalent to our s. 226(3)(a) of the Act, has been described by A. Ramaiya in the book entitled *Guide to the Companies Act* at p. 2449 in these words:

> The object of winding up a company by the court is to facilitate the protection and realization of its assets with a view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Consequently, once the court has taken the assets of a company under its control or has passed an order for it being wound up, it will not be proper to allow proceedings to be started or continued against the company and embarrass the administration of its affairs. The present action is intended to safeguard the assets of a company in winding up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up court itself.

The case of *Deutsche Bank v. SP Kala* [1990] 67 Com Case 474 at p. 477 (Bom) which was affirmed by the case of sub-nom *Deutsche Bank v. SP Kala* [1992] 74 Com Cases 577 (Bom-DE) laid down the principle that once a winding-up order was made, no proceeding can continue or be freshly commenced except by the leave of the court.

Further down at p. 163 he said:

> In *Seymour & Anor v. Soutnern Districts Video Pty Ltd (In liquidation)* [1985] 3 ACLC 420, the Australian High Court had to construe sub-s. 401(2) of the Companies (Western Australia) Code ('the Code') which was worded in this way:
>
> > After the commencement of the winding up, no action or other civil proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.
>
> Toohey J delivered the judgment of the court and his Lordship had this to say (at p. 423):
>
> > Subsection 401(2) of the Code is a law relating to procedure and, except as otherwise provided by the laws of the Commonwealth, it is binding on courts exercising federal jurisdiction. The subsection is expressed in general terms, so far as the prohibition is concerned, in that it strikes at all actions and other civil proceedings. It may seem curious that the leave of the Supreme Court is required to commence proceedings in the Federal Court or to continue such proceedings. But that is the result of federal legislation, not of State legislation.

The case falls squarely within the situation in the present application. In *Rawat Raj Kumar Singh and Others v. Benares Bank Ltd., Benares (in liquidation) and Others* [1941] AIR All 154 where it was held that where a decree in favour of a company had been passed and the judgment debtor had appealed from the decree and went on with his appeal at the date of the winding-up of the company, he should he regarded as proceeding with legal proceedings against the company and he could not do so without leave of the court. At pp. 155 and 156 Braund J said:

> ... The proceeding on foot at the date of the winding up order was the appeal by the company and it was open to the company to go on with that appeal without the leave of the Court. With that introduction it is possible to see what it was that Lord Davey in his speech actually said. He said this:
>
> > ... The respondents, that is to say the company, "now" object that the present appellants cannot proceed with their appeal without the leave of the Court in Ireland. I am of opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, *and when once an action by the company itself has been proceeded with,* there is necessity for the defendants in the action to obtain leave for any defensive proceeding on their part ...
>
> The italics are, of course, my own, but in my view, the words they cover afford the clue to what it was that the House of Lords really said in this case. His Lordship, as it seems to me, said no more than that when you find that at the date of the winding up order there is a proceeding already on foot, which proceeding requires no leave of the Court to prosecute it, then that proceeding may go on to its logical conclusion without leave of the Court. In other words, he said that, inasmuch as the appeal which was pending at the date of the winding up order in that case was an appeal by the company itself and, as such, was one which needed no leave to prosecute it, it was a proceeding which might go on to its ultimate conclusion – including an appeal to the House of Lords – notwithstanding s. 87, Companies Act of 1862, which was the Act then in force. Now reverting to the Full Bench case of the Punjab Chief Court it appears to me with great respect that the learned Judges have overlooked that the decision in [1901] 85 LT 141 was limited in the way I have pointed out. It is not, I think, an authority which decides, in general terms, that wherever you find an appeal from a suit in which the company itself was the plaintiffs, that appeal may be either proceeded with or commenced without the leave of the Court. ...

This court in *Chi Liung Holdings Sdn. Bhd. v. Ng Pyak Yeow* [1995] 4 CLJ 11 it was held that an applicant should have first obtained authority from the winding-up judge before proceeding against the liquidator. At p. 14 Abu Mansor JCA (as he then was) said:

When the learned judge was at the point of examining issue No. 2 he held:

> When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except –
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.
>
> As s. 226(3) has not been complied with by the applicant, this originating motion, in my view, is not properly before the court and should therefore be struck out.
>
> In the circumstances this originating motion is dismissed with costs.
>
> If the reason for the dismissal of the applicant's application as found by the learned judge under s. 226(3) of the Companies Act 1965 is valid, then that is the end of this matter ...

Further down at p. 17 he said:

> We respectfully agree with the learned judge below that the applicant's application should be so dismissed but for a different reason than that given by the learned judge. We think that s. 226(3) of the Act only applies where the action is against the company ...

In view of what we have stated above it is clear to us that to proceed with the appeal leave of winding-up court under s. 226(3) is required. This requirement must be complied with. In *Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour and Manpower & Anor* [1983] 2 CLJ 7 it was held that the appellant was out of time and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned judge and therefore leave should not have been granted to the appellant to apply for *certiorari* and the learned judge had no jurisdiction to do so. Abdoolcader FJ at p. 8 said:

> ... As the decision of the Minister sought to be impugned is dated November 23, 1981, the period of six weeks would, on a computation under Order 3 rule 2(2) of the Rules of the High Court, expire on January 5, 1982, and as the application for leave was made on January 9, 1982 the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule. Apparently this point completely escaped all parties involved, as a result perhaps of an affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. We took the point ourselves as it clearly goes to the jurisdiction of the court from which leave to apply

for *certiorari* was sought as Order 53 rule (1) stipulates that no application for an order of *certiorari* shall be made unless leave therefor has been granted and rule 1A which we have already adverted to enacts that leave shall not be granted except in accordance with its specific provisions.

Lord Hodson said in his judgment in *Secretary of State for Defence v. Warn* (at page 402): "Procedural sections are usually mandatory and there is nothing which points to the contrary in this case" ...

The Federal Court in a more recent decision in *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & 3 Ors.* [1995] 3 CLJ 485 held that it is an elementary proposition that the Federal Court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

For the reasons we have stated above we allowed the application by the respondent as in the notice of motion with costs. The notice of appeal dated 19 May 2000 is hereby struck off.

As a result of the striking out of the notice of appeal we have made several consequential orders. Appeal No. A-02-338-2000 was dismissed with costs because that appeal was not properly before the court. Appeal No. A-02-848-98 was also dismissed with costs. In appeal No. W-02-29-2000 the learned counsel for the appellant conceded that in view of the court's decision in the notis usul, the appeal should be dismissed. Appeal No. W-02-115-2000 was allowed with costs here and the court below. The order of the learned judge was set aside.

Those deposits paid by the appellant are to be paid to the respondent to account of taxed costs. The deposits paid by the respondent to be refunded to the respondent.